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NO. 93-1633

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM O. SWAN and
KATHLEEN R. SWAN,

Petitioners,

v.

KURT S. PETERSON, et al.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly applied *Idaho v. Wright*, 497 U.S. 805 (1990) in ruling that Petitioners' Sixth Amendment right to confrontation was not violated by the trial court's admitting into evidence the hearsay statements of two child sexual abuse victims.

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BRIEF IN OPPOSITION

Respondents Kurt S. Peterson, Alice Payne,[1] and Chase Riveland, by and through Christine O. Gregoire, Attorney General for the State of Washington, and Paul D. Weisser, Assistant Attorney General, respectfully pray for an order denying a writ of certiorari to review the judgment of the United

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[1]Alice Payne has succeeded Eldon Vail as the Superintendent of the Washington Corrections Center for Women and is substituted as Respondent in this Court pursuant to Supreme Court Rule 35.3.

States Court of Appeals for the Ninth Circuit.

I. STATEMENT OF THE CASE

A. Facts of the Case

The Petitioners' (hereinafter, the Swans) petition in this Court relies in large part upon their slanted account of the facts of their case, as though no court had previously reviewed and rejected that version of the facts. The Washington Supreme Court authoritatively summarized the facts of the Swans' crimes, their victims' out-of-court statements, and the 1986 trial proceedings as follows:

> On October 2, 1985, 3-year-old B.A. walked out of a day-care center bathroom with her dress tucked in her tights. The center's teacher, Lisa Conradi, untucked the dress and told B.A. to keep her private parts covered. When B.A. appeared confused, Conradi explained that "private parts" means the areas covered by her bathing suit. B.A. pointed to her chest and crotch area. Conradi then added that no one should look at or touch B.A.'s private parts, whereupon B.A. said, "Uh-huh, Mommy and Daddy do." When asked "What do Mommy and Daddy do?", B.A. replied, "Mommy spits on me." Conradi asked where, and B.A. pointed to her crotch. At this point, Conradi gave B.A. a book and took the rest of the children downstairs. When Conradi returned, she asked B.A. if her parents did anything else to her private parts. B.A. said she spits on Mommy in her private parts and that Daddy "puts his potty in me and it hurts real bad." Conradi explained that a man's potty was a penis. The two then walked around the room. B.A. played peekaboo from behind a door with Conradi several times, and said, "My daddy plays peekaboo with me."

She also said, "My daddy puts his penis in my mouth and icky milk comes out." When asked who else played this game, B.A. said Josh does. B.A. also said they played the games in the bedroom with their clothes off.

When Cindy Bratvold, the day-care owner, returned to the center a short while later, Conradi told her about B.A.'s statements. Bratvold then called Child Protective Services (CPS). After calling CPS, Bratvold asked B.A. whether her close friend R.T., who attended the same day-care center, played games with B.A.'s parents. B.A. said "yes".

Two CPS caseworkers interviewed B.A. that day. B.A. would not answer questions they posed, but when Conradi asked in their presence if her mother spit on her or put her mouth on B.A.'s private parts, the child nodded and said "yes". The interview ended when the defendant Kathleen Swan came to take her daughter B.A. home. The CPS caseworkers then decided to interview R.T. and B.A. on October 4, when both girls were scheduled to be at the day-care center.

R.T. came to the center the following day, October 3, but B.A. did not. Bratvold took R.T. upstairs and began to talk to her. Bratvold started by asking R.T. if she liked certain people, including "B.A.'s mommy". R.T. liked the people listed and "kind of" liked Kathy Swan. When asked what she meant, R.T. said "she makes us play funny games." These games included exercise games and ring around the rosy in the nude and falling on the bed. "Then we kiss Kathy's boobies and we lick her potty, and she does that to us, too." R.T. also said that "Kathy puts--one time Kathy put something in my potty and made me bleed, and she cleaned it up and told me not to say anything."

R.T. then said she played games with "Uncle Bill" (the defendant William Swan). She said that Uncle Bill's favorite game was the happy birthday game. "And that's where he puts his peepee in my mouth and shakes it around, and then he says, 'Here is your birthday present,' and something icky gets in my mouth." R.T. also said that the Swans put candles and marbles in her "peepee". She added that another man, John or Josh, played the games.

The next day, a CPS caseworker came to the Bratvold day-care center to talk to the two girls. An initial attempt to interview them together proved unsuccessful, so the caseworker talked to the girls separately in Bratvold's presence. R.T. told the caseworker that she played "with a game of marbles" at the Swans' home. She then added, "Bill plays without his clothes on. Bill touches my potty with his fingers." When asked what a "potty" was, R.T. said it was a "peepee hole". R.T. then said, "Kathy put some marbles in my bottom." When asked where her bottom was she said "peepee hole" and pointed to the vaginal area of an anatomically correct doll that the caseworker had brought. R.T. then added, "I am afraid . . . Kathy touches my potty. Blood was on my bottom. Kathy put something in my peepee hole. It hurt." She said there was blood "down there" and pointed to her crotch. She also said that she touched Kathy's "potty and boobies" and put her mouth on them. R.T. then said that B.A. was present, and added, "I am too afraid for it. I just hurt, she poked a marble in it, she just put a marble in it, in my potty." What happened? "Kathy fixed it."

Bratvold then asked R.T. about the happy birthday games. R.T. said, "Bill and Kathy put a candle in my potty and played happy birthday. Bill put marbles in my potty to make it better. Stuff comes out of his peepee." When asked if the "stuff" was like milk, water, or blood, R.T. replied, "Like milk." She added that "Bill gives

me a happy birthday present, gives me one in my bottom." When asked if she liked Bill, R.T. said, "He is mean, I don't like him, he hurts me, he puts his peepee - - ." R.T. pointed to the vagina on the doll when asked where Bill puts his peepee on her. "It hurt." R.T. added that B.A. played the marble and hap`y birthday games with the defendants.

The CPS caseworker then interviewed B.A. When asked if Mommy spits on her potty, B.A. replied, "Yes". When asked where Daddy puts his peepee, she said, "On my potty." When asked how it felt, she answered, "It hurts". B.A. said R.T. was present when these things happened, and she said that she played happy birthday and marble games with her mother and father, but she would not describe the games.

After the interviews, the police were called and the children were taken into protective custody. B.A. was placed in a foster home while R.T. was returned to her parents and continued to attend Bratvold's day-care center. Two months later, R.T. told Bratvold she wanted to tell her something. "See my finger? I have a burn. I had a burn. . . . When Bill and Kathy lit the candle in my potty and I tried to grab it out, my finger got burned, and then I bumped my head on the counter when they made me lay on the counter." On October 17, 1985, after the alleged abuse came to light, R.T. spontaneously told her father that "Bill and Kathy are bad" because they put marbles in her bottom.

B.A.'s foster mother testified that while drying B.A. off after a bath, B.A. told her that her mommy and daddy put marbles in her potty. The foster mother asked her son for some toy marbles and asked B.A. if they were the type of marbles Daddy put in her potty. B.A. laughed and said no. When asked what kind of marbles Daddy used, B.A. pointed to her crotch. The foster mother then asked if the marbles were on

> Daddy's potty, and B.A. pointed to her crotch and said, "Yes, and a snake full of marbles." The foster mother also testified that B.A. had mentioned marbles on other occasions, and oncehad said that her daddy put marbles and other things inside her potty and then started to cry as she said this. The foster mother testified further that B.A. once brought up the subject of birthday candles in her potty.
>
> Having outlined the parallel disclosures made by the children, we now turn to an analysis thereof to determine whether, as the State argues, these disclosures are corroborative evidence of the alleged abuse.
>
> B.A. and R.T. did not have contact with each other on October 2 or 3, the days that they talked to the day-care workers. On October 4 they sat together but briefly before their separate interviews by the CPS caseworker.
>
> Summarizing the similarities between the statements of these two 3-year-old children, we find the following. B.A. said that her daddy put "his potty in me", and R.T. said that he put his "peepee" in her. B.A. said that Daddy put his penis in her mouth and icky milk came out; R.T. said Uncle Bill put his potty in her mouth and something icky, like milk, came out. B.A. said that she and her parents played games in the bedroom without clothes on; R.T. said that they played ring around the rosy in the nude, that Uncle Bill played without his clothes on, and that they fell on the bed after their games. B.A. said Josh also played the games, while R.T. said John or Josh played. B.A. said that her parents put marbles and birthday candles in her potty; R.T. said that the Swans put candles and marbles in her peepee and her bottom.

State v. Swan, 114 Wn.2d 613, 624-28, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). *See also* Pet. App. A-5 -

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B. Procedural History of Case

At the Swans' 1986 trial, whenever one of the child victim's hearsay statements was about to be elicited from a witness, the trial court excused the jury and voir dire examination was conducted to determine the reliability of the statements. The trial court found each of the girls' hearsay statements to be reliable and admitted them into evidence. The Swans were convicted of two counts of first degree statutory rape and were each sentenced to 50 month terms of imprisonment.[2] The Washington Court of Appeals reversed their convictions, holding that the hearsay statements of the three-year-old victims were reliable under the Confrontation Clause but that there was insufficient corroboration of sexual abuse as to one of the victims, a state law requirement for admissibility of child hearsay statements.[3]

However, the Washington Supreme Court unanimously reversed the Court of Appeals decision and reinstated the Swans' convictions. *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990). The Washington Supreme Court thoroughly reviewed

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[2]The Swans have completely served their sentences.

[3]Washington State law requires that trial courts, before admitting hearsay statements made by child sexual crime victims, make separate determinations that the hearsay statement is reliable *and* is corroborated by independent evidence of the crime. *See* RCW 9A.44.120

the time, content, and circumstances of the child victims' statements and found them to be reliable under the ConfrontationClause (as had the Washington Court of Appeals). The state Supreme Court specifically found that: (1) neither B.A. nor R.T. had a motive to lie; (2) the girls had reputations for truthfulness; (3) the girls used specific terms and age-appropriate language in their statements; (4) the girls' responses were voluntary and spontaneous either as responses to open-ended questions or no questions at all; (5) there existed a relationship of trust between the girls and the adult witnesses; (6) there was no possibility of collaboration between B.A. and R.T.; (7) the girls gave similar accounts of sexual abuse to more than one person; (8) cross-examination of the girls would not show a lack of knowledge; and (9) no circumstances were present to suggest that the girls misrepresented either defendant's involvement. *Id.* at 648-52. The Court therefore concluded that the statements were admissible under the federal Constitution and state law. *Id.* This Court denied the Swans' petition for writ of certiorari. *Swan v. Washington*, 498 U.S. 1046 (1991).

In July 1990, the Swans filed identical petitions (later consolidated) for writ of habeas corpus under 28 U.S.C § 2254, arguing that the admission of B.A. and R.T.'s hearsay statements violated their rights under the Confrontation Clause. The district court conducted an independent review of the state court record

and reached conclusions similar to the state courts' regarding the reliability of the girl's statements. *See* Pet. App. A-10 - A-27. The court noted that each of B.A. and R.T.'s initial statements, with no sign of collaboration between the girls, contained "a spontaneous description of oral intercourse which was so specific, and showed such inappropriate and precocious knowledge, that it would be difficult to see this knowledge as anything other than the result of personal experience." *Id.* at A-17. The court also observed that the statements were made spontaneously and without motive to fabricate, that neither of the girls was prone to lying or storytelling, and that the allegations did not grow over time as a result of repeated questioning. *Id.* at A-18 - A-25. The district court denied the Swan's petition.

On appeal, the Ninth Circuit affirmed the district court's findings and conclusions. The Ninth Circuit held that B.A. and R.T.'s statements were admissible at trial and caused no Confrontation Clause violation because the statements were clearly reliable, citing *Idaho v. Wright*, 497 U.S. 805 (1990). *Swan v. Peterson*, 6 F.3d 1373, 1379-83 (9th Cir. 1993). Thus, every judge, both state and federal, to have reviewed the hearsay statements of B.A. and R.T. has found them to be reliable for purposes of the Confrontation Clause.

II. REASONS FOR DENYING THE WRIT

The Swans' case does not present a significant issue of law. Rather, the Swans are simply dissatisfied with the outcome of the Ninth Circuit's application of *Idaho v. Wright*, 497 U.S. 805 (1990) to their case and are merely asking this Court to conduct yet another review of the facts of their particular case. This does not raise a substantial federal question. Moreover, the courts below and the state courts correctly applied the proper Confrontation Clause analysis to the facts of their case. Therefore, the Swans' petition for a writ of certiorari should be denied.

A. The Swans' Case Presents No Conflicts With This Court's Decisions Nor Any Intercircuit Conflict.

1. The Ninth Circuit's Decision Is Consistent With This Court's Confrontation Clause Jurisprudence.

A literal reading of the Sixth Amendment's Confrontation Clause would effectively bar the use of all out-of-court statements and other hearsay evidence at criminal trials, "a result long rejected as unintended and too extreme." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Although the Confrontation Clause and the rules governing hearsay evidence both stem from the same roots and are designed to protect similar values, they are not equivalent. *Idaho v. Wright*, 497 U.S. 805, 813-14 (1990); *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (plurality

opinion); *California v. Green*, 399 U.S. 149, 155 (1970). The Confrontation Clause may bar the admission of some evidence that would be otherwise admissible under an exception to the hearsay rule; conversely, a violation of the hearsay rule is not necessarily a violation of the Confrontation Clause. *Wright, supra*; *Green*, 399 U.S. at 155-56.

Under this Court's test, the Confrontation Clause will prohibit the use of hearsay evidence unless it bears adequate "indicia of reliability." *Roberts*, 448 U.S. at 65-66. In cases where the out-of-court statement falls within a firmly-rooted hearsay exception, reliability is inferred and the Confrontation Clause is satisfied. *White v. Illinois*, ___ U.S. ___, 112 S. Ct. 736, 743 (1992); *Roberts*, 448 U.S. at 66. In other cases, the evidence is inadmissible unless the State demonstrates that the evidence carries "particularized guarantees of trustworthiness" that render it reliable. *Roberts, supra*.[4]

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[4]Dicta from *Ohio v. Roberts* would appear to suggest that, in addition to establishing the reliability of an out-of-court statement, the Confrontation Clause also requires that in all cases the State either produce the hearsay declarant at trial or to demonstrate that the declarant is unavailable. *See Roberts*, 448 U.S. at 65 ("In the usual case, . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant . . .); *id.* at 66 ("the Confrontation clause normally requires a showing that [the hearsay declarant] is unavailable"). In more recent cases, however, this Court has clarified that aspect of *Roberts* and has held that "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White v. Illinois*, ___ U.S. ___, 112 S. Ct. 736, 741 (1992); *see also United States v. Inadi*, 475 U.S. 387 (1986). Thus, aside from cases involving prior

The test of whether a hearsay statement is reliable is not whether it satisfies a prescribed list of trustworthiness factors. Instead, the required "particularized guarantees of trustworthiness" involve an assessment of a variety of factors and must be drawn from "the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. at 821. No mechanical test is appropriate, and courts are given "considerable leeway" in their review of appropriate factors bearing on the reliability of hearsay evidence. *Id.* at 822.

Both the district court and the Ninth Circuit thoroughly and carefully analyzed the admission of B.A. and R.T.'s out-of-court statements in light of *Idaho v. Wright* and *Ohio v. Roberts*. *See Swan v. Peterson*, 6 F.3d at 1379-83; Pet. App. A-10 - A-27. The Ninth Circuit reviewed and agreed with the state courts' and the district court's specific findings with regard to the reliability of B.A. and R.T.'s statements: (1) neither girl had a motive or a tendency to lie; (2) both girls used age-appropriate language to describe specific sexual acts; (3) the statements were spontaneous responses to open-ended questions or to no questions at all; and (4) the disclosures were made to adults with whom the girls had a relationship of trust. *Swan*, 6 F.3d at 1380-81. The

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testimony, the Confrontation Clause imposes no "unavailability" requirement.

Ninth Circuit observed that the first three of these reliability factors were of a type explicitly approved by this Court in *Wright* and that the fourth factor was consistent with the wide latitude that trial courts must have in making reliability determinations. *Id.* at 1380.

The Ninth Circuit's opinion is entirely in accord with this Court's Confrontation Clause jurisprudence that reliable hearsay evidence is admissible. The Swans cannot point to any conflict or controversy within the circuit courts over the proper analysis under the Sixth Amendment or the application of *Wright*. Thus, their case is an inappropriate vehicle for this Court to revisit the settled Confrontation Clause test for the admissibility of hearsay testimony.

2. The Swans' Petition Ignores and Mischaracterizes the Lower Courts' Findings and Conclusions.

The Swans' Confrontation Clause claim is ultimately governed by the specific facts as found by the state courts and the district court. In federal habeas corpus proceedings, a state court's findings on the merits of a factual issue are entitled to a presumption of correctness and may be set aside only if the federal court concludes that the findings are not "fairly supported by the record." *Sumner v. Mata*, 449 U.S. 539, 551 (1981); 28 U.S.C. § 2254(d). The presumption applies equally to the factual findings of a state's trial courts and its appellate courts.

Mata, 449 U.S. at 545-47. While a state court's conclusions regarding mixed questions of law and fact are not governed by § 2254(d), the court's findings of fact underlying its ultimate conclusion of a legal or mixed question *are* governed by the statutory presumption of correctness. *Miller v. Fenton*, 474 U.S. 104, 112 (1985); *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983). "[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller*, 474 U.S. at 113.

A federal district court's findings of historical fact are also entitled to great deference and may be set aside only if clearly erroneous. Fed. R. Civ. P. 52(a). Although special deference is accorded to a district court's credibility determinations, the "clearly erroneous" standard applies to all findings by a district court, whether they rest on credibility determinations or whether they are based on physical or documentary evidence or inferences from other facts. *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson, supra; see also Amadeo v. Zant*, 486 U.S. 214, 225-26 (1988).

The Swans do not seriously challenge the reliability factors as found by the trial court, the Washington Supreme Court, and the district court and that were approved by the Ninth

Circuit. That is, they have not suggested in what particular way the state courts' findings are not entitled to the presumption of correctness or the district court's independent findings are clearly erroneous. Rather, they challenge the legal weight to be assigned to them or argue that the presence of other factors undercut the lower federal courts' and state courts' unanimous conclusion that B.A. and R.T.'s statements were admissible. They base their attack on a fundamentally flawed version of the decision in their case.

For example, the Swans allege that the Ninth Circuit and the other courts concluded that B.A. and R.T.'s statements bore particularized guarantees of trustworthiness "based *solely* on upon [sic] their consistency with prior statements" or "based *solely* upon the consistency of these statements with other statements." *See* Petition, Questions I and II (emphasis added). Actually, the Ninth Circuit eschewed any "consistency" or cross-corroboration factors from its analysis for the statements' reliability under *Wright*. *Swan*, 6 F.3d at 1380.

> Nevertheless, we do not conclude that the bootstrapping errors of the state courts and the district court tainted their reliability determinations. Neither the state courts nor the district courts indicated that cross-corroboration was a primary reason for finding the statements reliable; indeed, the district court found most significant the knowledge of sexual acts unexpected of children that age.

Id. at 1380-81. Thus, the admissibility of the victims out-of-court statements was governed by factors unrelated to their consistency.[5]

The Swans also allege that R.T.'s statements also did not possess the requisite guarantees of trustworthiness because she was found incompetent to testify based upon her "inability to speak truthfully". Petition, Question IV.[6] However, R.T.'s incompetency was actually based on her inability to communicate in a courtroom setting, not on a supposed inability to tell the truth at the time she made her out-of-court statements. As this Court held in *Wright*, "the Confrontation Clause does not erect a *per se* rule barring admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial." *Wright*, 497 U.S. at 825. In the Swans' case, "[t]he trial court recognized the distinction between R.T.'s ability to testify in a courtroom setting and to tell the truth at the time of the

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[5]The trial court and the Washington Supreme Court were required by state law to make separate determinations of reliability *and* corroboration regarding the admissibility of a hearsay statement made by a child sexual abuse victim who is unavailable to testify. *See* RCW 9A.44.120. Therefore, the state court's findings on the two different subjects should not be blended in such a way (as the Swans would have it) as to make it appear that the courts boot-strapped the statements' consistency (a relevant corroboration factor) into the reliability analysis. However, it is axiomatic that, had the girls' statements been in any way *inconsistent*, the Swans would seize upon the fact and argue that it renders the statements unreliable.

[6]B.A. was also found to be incompetent to testify but the Swans do not make any similar contention with respect to B.A.'s statements.

declarations. It clearly considered her incompetent only as to the former." *Swan*, 6 F.3d at 1382; *see also State v. Swan*, 114 Wn.2d at 651 ("During the competency hearing, . . . R.T. could not respond appropriately to questions in a court room setting"). Moreover, the trial court in the Swans' case specifically noted that R.T.'s incompetency to testify would be weighed in its determination of the reliability of R.T.'s statements. That the trial court ultimately concluded that R.T.'s statements were reliable despite her incompetency to testify does not undercut the admissibility of her statements.

The Swans' allegation that R.T.'s later, incorrect statements to a police detective were evidence of a lack of corroboration and, therefore, demonstrate that R.T.'s earlier disclosures were unreliable, *see* Petition, Question III and pp. 40-44, is incompatible with their argument that consistency or cross-corroboration is not a legitimate factor to consider in determining the reliability of a hearsay statement. Moreover, this Court held in *Wright* that evidence tending to corroborate the truth of a hearsay statement is irrelevant to the Confrontation Clause analysis for reliability. *Wright*, 497 U.S. at 822. If corroboration sheds no light on the reliability of a hearsay statement, then a later, arguably noncorroborative statement is also irrelevant to determining the reliability of the earlier statement.

The Swans argue that the reporters of B.A. and R.T.'s hearsay statements (Lisa Conradi and Cindy Bratvold) were "predisposed" to find sexual abuse and that the girls' statements were unreliable as a result. Petition, Question V. However, their allegation of "predisposition" is purely speculative, is unsupported by any findings, and is more properly a matter for the jury to weigh in determining the witnesses' credibility and whether they actually heard the girls' statements. The Swans were free to argue and did argue to the jury that witnesses Conradi and Bratvold were predisposed to finding sexual abuse. There is similarly no evidence to support the Swans' broad allegation that B.A. and R.T. were "tainted" for purposes of their later interviews due to the conduct of their earlier interviews. Petition, Question VI.

The facts of the Swans' case have been thoroughly and exhaustively reviewed by eighteen judges, all of whom have concluded that B.A. and R.T.'s out-of-court statements were reliable under the Confrontation Clause. The Ninth Circuit's affirmance of the district court constituted no departure from *Idaho v. Wright*, and there is no conflict among the circuits on this issue. This case does not present any ground for acceptance of review under Supreme Court Rule 10.1. Therefore, the Swans' petition should be denied.

B. The Confrontation Clause Analysis Urged By the Swans and *Amicus* Would Require the Creation and Retroactive Application of a New Rule, in Violation of *Teague v. Lane*.

In their remaining argument in this Court, the Swans and *amicus* argue that the Confrontation Clause requires that: (1) a criminal defendant cannot be convicted on the basis of hearsay alone;[7] (2) arguably noncorroborative evidence should be factored into the reliability analysis; (3) the trial court must, as a threshold matter, assess the credibility of the witness reporting the hearsay statements. *See* Petition, Question VI; Brief of Amicus, Questions 1, 3, 4 (p. 9).[8] However, each of those arguments would require that this Court create a new constitutional rule of criminal procedure on federal habeas corpus review, a step this Court has clearly emphasized is inappropriate to take. *Teague v. Lane*, 489 U.S. 288 (1989). Whatever may be the merits of their policy arguments, this case is not the case for deciding such arguments.

The Swans and *amicus* argue that the Confrontation Clause requires that a criminal defendant cannot be convicted on

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[7]The Ninth Circuit specifically declined to reach the merits of this contention because it was raised for the first time on appeal, not in their habeas petition, and because it was raised by *amicus* only and was not adopted by the Swans. *Swan*, 6 F.3d at 1383. For that additional reason this Court should deny certiorari.

[8]This Court has not yet ruled on the Motion for Leave to File *Amicus Curiae* Brief. Respondents are addressing the arguments of *amicus* in this Brief in Opposition only in the event this Court grants *amicus'* motion.

the basis of hearsay evidence alone. They argue that hearsay alone should be considered inadequate as a matter of law to sustain a conviction because otherwise "there necessarily remains the reasonable doubt that the declarant misspoke, misstated, misremembered, or misperceived." Brief of *Amicus* at 35. Neither the Swans nor *amicus*, however, can point to any decision by this Court at the time their convictions became final that would require a state court to set aside a conviction based solely upon hearsay.[9] Indeed, *amicus* acknowledges this by describing this issue as an "*unresolved* and fundamentally important question." *Id.* at 34 (emphasis added). Thus, the argument specifically requests that the Court create a new constitutional rule of criminal procedure.

Amicus would also require that the trial court consider arguably noncorroborative evidence (*i.e.*, the lack of medical evidence of sexual abuse) in deciding whether a child's hearsay statement is reliable. However, that is a requirement that would necessitate a retraction of *Wright*'s consistent teaching that corroboration of a hearsay statement is constitutionally

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[9]As the Ninth Circuit observed, it is not altogether clear that the Swans convictions rest solely on the hearsay evidence. *Swan*, 6 F.3d at 1383 n. 11. The Washington Supreme Court found that R.T.'s behavior with an anatomically correct doll, B.A.'s masturbatory conduct and the slight physical and emotional evidence of her abuse, and the two girls' unusual "greetings" of each other (consisting of the girls running up to each other, grabbing their crotches, and giggling) provided some corroboration to their statements. *State v. Swan*, 114 Wn.2d at 641.

irrelevant. *Wright*, 497 U.S. at 822. The exclusive focus under *Wright* is that the hearsay statement possess the requisite indicia of reliability "by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* Requiring trial courts to weight arguably noncorroborative evidence would shift the trial court's focus away from the "*inherent* trustworthiness" of the statement and would constitute a sharp break from *Wright*.

Finally, requiring trial courts to assess the credibility of the reporting witness of the hearsay statement as part of the reliability inquiry is also a drastic departure from *Wright*. *Wright* limits the reliability inquiry to whether the circumstances "that surround the making of the statement and that make the *declarant* particularly worthy of belief." 497 U.S. at 820 (emphasis added). No court has held that the credibility of the reporting witness -- a question reserved for the jury -- must be weighed by the trial court as a threshold factor bearing on the reliability of a hearsay statement. To impose such a requirement now would introduce a new species of analysis into the Confrontation Clause test for reliability.

In short, none of the Swans and *amicus'* policy contentions regarding how a trial court "should" conduct its reliability inquiry or the legal sufficiency of a conviction is required by *Wright* or by any other decisions in existence at the time their convictions became final. The Swans' case, a case

arising in the context of federal habeas corpus review, is not a proper occasion for this Court to depart from precedent and create new constitutional rules of criminal procedure. Therefore, for this additional reason the Swans' petition should be denied.

III. CONCLUSION

Respondents respectfully request that this Court deny the Swans' Petition for a writ of certiorari.

RESPECTFULLY SUBMITTED,

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